FILE COPY

Office - Supreme Court, U. S.
FILED
APR 5 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

v.

THE UNITED STATES

BRIEF OF AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
ARTHUR GARFIELD HAYS,
Counsel.

RICHARD H. HANNA,
Of the New Mexico Bar;
OSMOND K. FRAENKEL,
ALFRED S. JULIEN,
Of the New York Bar,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,
Petitioners,

v.

THE UNITED STATES

PETITION FOR REHEARING

Brief Submitted in Behalf of American Civil Liberties Union, Amicus Curiae

I

The American Civil Liberties Union files this brief, *amicus curiae,* in support of the petition for rehearing in this case because it is our view that the broad principles enunciated in the opinions of the Court herein will, if the decision be permitted to stand, materially reduce present juridical rights of the American Indian.

We are, moreover, frankly alarmed at the considerations which apparently induced the Justices joining in the concurring opinion to rule with the majority. In the concurring opinion, Justices Jackson and Black express the view that it is of little consequence whether the Indians prevail in this suit and thereby establish a fund in the Treasury to

their credit, for Congress may, nevertheless, make grants to the Indians for their "health, education, and industrial advancement". This statement of policy, in our opinion, if left unchallenged, would run contra to the modern concepts which have been employed up to now by the Government and our Courts in establishing the Indian's proper status in the community. The concurring opinion overlooks the essential difference between self-help and mendicancy.

In recent years, those concerned with Indian affairs have devoted themselves to the restoration of the self-respect of the American Indian and the encouragement of his assuming an independent status in the community. Too long has the Indian been treated as a beggar on Government relief. His feeling of inferiority has been fostered by the separation from his neighbors in the community who did not similarly enjoy grants and doles afforded the Indian.

The presence of a substantial fund available in the National Treasury upon which the Indian tribe may draw as a matter of right, however, is a wholly different affair. The respect of his neighbors and the self-respect of the Indian himself are promoted thereby.

We do not urge the above as grounds for a grant to the Shoshone Indians, to which they are otherwise not entitled; we make this point to substantiate the contention that the outcome of this case is far more important than the concurring opinion indicated. It *is* material to the Indian and to the community whether he receives funds for "health, education and industrial advancement" as of dignified right or by way of patronizing allowance.

II

The strict construction of the Box Elder Treaty employed in the prevailing opinion to the detriment of the Indians marks an abrupt reversal of tenets of construction heretofore used in reaching the intent and purpose of Indian

treaties. It is unfortunate that this Court should have been divided in a case so far-reaching.

That the meaning of the treaty is ambiguous is demonstrated by the cleavage within the Court itself. It is axiomatic that ambiguities and doubts contained in these treaties are necessarily to be resolved in favor of the Indians. *Winters* v. *United States*, 207 U. S. 564; *United States* v. *Shoshone Tribe*, 304 U. S. 111. Without expressly rejecting this rule of construction, the prevailing opinion, by its rigid interpretation of the treaty, has arrived at a contrary result.

We think that the Court should have employed the customary rule of construction in interpreting the Box Elder Treaty rather than attempting to define the intent of the parties from its uncertain language. Since the Justices of this Court are at odds with respect to the meaning of the document, it is clear that we reach the realm of speculation when we probe for the intent of the aborigines who were one of the "high" contracting parties thereto. In so doing, the majority and concurring opinions have effectively avoided the very purpose of the usual rule of construction.

The American Indian believes that when the United States obtained valuable cessions by treaty, it was acknowledging the Indians' claim to the land. Otherwise, this treaty, and many like it, would have been vain and meaningless compacts. Surely, our Government would not solicit limited grants with respect to property from those lacking power to make them. This is a weighty consideration in favor of finding that it was the intent of the Indians in this treaty that their land rights be recognized.

III

The case *sub judice* is vital to all Indians. The technicalities of this case have sizably cut down the Indian's legal rights under this and similar treaties. The Indians' respect

for our institutions and our Government will not be promoted by the knowledge that their cause has been lost for want of expert Anglo-Saxon scrivening when these treaties were negotiated.

Moreover, not only this minority but our entire democracy suffers by the restriction of the rights of any group on dubious technical grounds. Only recently were the rights of another minority adjudicated adversely on exceptionally technical bases. *Korematsu* v. *United States*, — U. S. —, decided Dec. 18, 1944.

Where minorities suffer, the community at large is the loser.

We do not think that profit can inure to anyone by leaving the "health, education and industrial advancement" of the Indian to the charity of the Congress when substantial justice can produce for the petitioners a fund rightfully theirs for such purposes. To the courts, no less than to the legislative branch of our Government, have been delegated the power and the duty to protect helpless minorities.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
ARTHUR GARFIELD HAYS,
Counsel.

RICHARD H. HANNA,
Of the New Mexico Bar;
OSMOND K. FRAENKEL,
ALFRED S. JULIEN,
Of the New York Bar,
Of Counsel.